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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DAEHNKE & CRUZ, A CALIFORNIA GENERAL PARTNERSHIP,

Plaintiff and Respondent,

v.

STEVEN A. FINK et al.,

Defendants and Appellants.

G039716

(Super. Ct. No. 07CC01103)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Robert D. Monarch, Judge. (Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Fink & Abraham, LLP; Stephen E. Abraham and Steven A. Fink for Defendants and Appellants.

Daehnke Cruz Law Group, LLP; Kevin J. Daehnke; Bonnie Bridges Mueller O'Keefe & Nichols and Vangi M. Johnson for Plaintiff and Respondent.

Steven Fink and Stephen Abraham, formerly two senior "Of Counsel" attorneys at the firm Daehnke & Cruz (D & C), assert this is the rare case in which the trial court should have overturned an arbitration award. The arbitrator was asked to resolve wage claims brought by Fink and Abraham against D & C, and a breach of contract claim brought by D & C against the two attorneys. On appeal, Fink, Abraham, and their firm, Fink & Abraham LLP (F & A) contend the trial court erred in ruling it lacked jurisdiction to set aside an award when it was plainly clear the arbitrator "failed to decide numerous issues, exceeded [its] jurisdiction, ignored the law, and violated the law." We conclude the trial court was right; it could not review the claimed errors of law or fact. The judgment is affirmed.

I

A. The Original "Of Counsel" Agreements

In September 2003, D & C and Fink executed an agreement wherein Fink (both an individual and as a professional corporation) agreed to be Of Counsel to the firm. In March 2004, Abraham executed a similar agreement. Both agreements provided a formula for calculating fees allotted to the Of Counsel attorneys. If the Of Counsel attorney was the "source" of a client, the attorney would receive 50 percent of all collections from that client for work actually performed, but only 12 percent of fee collections attributable to work of other attorneys and staff at the firm on those matters. If the firm was the source of the client, the Of Counsel attorney would receive 38 percent of fees collected if they worked on the matter.

B. Downsizing of the Firm in 2005 and the Compromise Agreements

In March 2005, one of D & C's equity partners (John Cruz) took a formal leave of absence from the firm due to his appointment by the Governor to the California State Gambling Commission. Cruz and his partner, Kevin J. Daehnke, determined it was necessary to downsize the firm's operations. Fink and Abraham decided to form their own law partnership, F & A. The parties soon began negotiations regarding the terms of

Fink's and Abraham's departure and transition into F & A. Fink and Abraham were concerned about D & C's creditors and also wanted start up capital for their new firm. D & C wanted to avoid litigation and have F & A continue providing revenue until they departed.

On May 13, 2005, the parties executed several agreements (collectively the 2005 compromise documents). First, they created written amendments to each Of Counsel agreement. In the amendments, D & C promised distributions would not be subject to any attachments by future creditor claims. Fink and Abraham were to be paid early in certain pending matters. The Of Counsel attorneys agreed to bill a minimum amount of 120 hours for the months of April and May 2005. The parties agreed the Of Counsel relationship would terminate effective May 31, 2005. In addition, Fink drafted a one-page document (referred to as exhibit No. 305), signed by all the parties, delineating several ongoing cases and outlining compromises on fee distributions. In addition, D & C promised to keep its malpractice insurance in effect through May 31 "to insure coverage for work performed by [Fink and Abraham] while at D & C."

C. The Wage Claims and Lawsuits

In September 2005, Fink and Abraham filed wage claims with the Labor Commission against D & C, claiming the firm failed to pay their wages. The following month, D & C filed a lawsuit alleging breach of contract, unjust enrichment, quantum meruit, conversion, intentional interference with contractual relations, misappropriation of trade secrets, and fraudulent inducement. After the court denied Fink's and Abraham's anti-SLAPP motion, they filed an appeal.

Meanwhile, the Labor Commission took the action off calendar based on its finding there were "overlapping wage issues" with the Superior Court complaint "that are best litigated in the Superior Court rather than the Labor Commission." Fink and Abraham filed separate lawsuits against Daehnke, Cruz, D & C, and the newly formed Daehnke Cruz Law Group, LLP, seeking relief for the defendants' failure to pay wages,

an accounting, and Labor Code waiting time penalties. The actions were consolidated, and at one of the hearings, the parties agreed to arbitrate the three lawsuits. The trial judge dismissed the three cases and the parties dismissed the pending appeal on the anti-SLAPP ruling.

D. The Arbitration

The parties agreed to arbitrate the action at Judicial Arbitration and Mediation Services, Inc. (JAMS) before retired Judge John C. Woolley. Over a three-day hearing, the arbitrator admitted over 60 exhibits and heard testimony from Daehnke, Abraham, and Fink. It issued an eight-page final arbitration award, ordering D & C to pay Abraham $7,132.98. It ordered Fink to refund to D & C an overpayment of $6,979.70. The court refused to authorize statutory interest to either party, and it refused to impose the requested Labor Code waiting time penalties. The arbitrator reasoned, "This litigation centers on the interpretation and effect of exhibit No. 305 [Fink's one-page agreement]." The arbitrator determined the document was a settlement resolving "who owes money to whom." It found the testimony by the parties indicated exhibit No. 305 was necessary because of (1) D & C's change in financial condition and downsizing; and (2) the opening of the new F & A law firm. It concluded both sides received something they wanted out of the compromise. D & C "negotiated for contribution to the office overhead for April and May 2005, continuous work on cases . . . (120 hours each month), and cooperation in billing and collection of fees" before and after Fink's and Abraham's departure. In return, Fink and Abraham "participated in an arrangement to place their compensation beyond the reach of [D & C's] creditors and obtain 'tail [insurance] coverage.'"

The arbitrator determined the "twin goals" of the 2005 compromise documents "appear to be cautious planning by the parties and not weak bargaining positions by [either side]. The evidence indicates the discussions were not harmonious, but it does not indicate they support the claim of duress." The arbitrator concluded the

parties had clearly chosen contract law to reach a settlement/compromise based on their understanding of contract and bankruptcy laws.

E. Motions to Confirm and Vacate the Arbitration Award

D & C filed a petition to confirm the arbitration award. Fink and Abraham filed a petition to vacate the award. Both petitions were considered on August 14, 2007. The court confirmed the award and denied the petition to vacate. A judgment was entered and filed in October 2007.

II

Our Supreme Court recently held that, except when parties expressly agree otherwise (see *Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1355-1356 (*DIRECTV*), "judicial review of private, binding arbitration awards is generally limited to the statutory grounds for vacating ([Code Civ. Proc.,] § 1286.2)[1] or correcting (§ 1286.6) an award[.]" (*Moshonov v. Walsh* (2000) 22 Cal.4th 771, 775 (*Moshonov*); *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 28 (*Moncharsh*).) A court may not vacate or correct an award because of an arbitrator's legal or factual error, even when the error appears on the face of the award. (*Moshonov, supra*, 22 Cal.4th at p. 775; *Moncharsh, supra*, 3 Cal.4th at p. 28.) It is within the "powers" of the arbitrator to resolve the entire "merits" of a "controversy submitted" to arbitration by the parties. (§§ 1286.2, subd. (a)(4), 1286.6, subd. (b); *Moncharsh, supra*, 3 Cal.4th at p. 28.) "[A]rbitrators do not 'exceed[] their powers' within the meaning of section 1286.2, subdivision (d) and section 1286.6, subdivision (b) merely by rendering an erroneous decision on a legal or factual issue, so long as the issue was within the scope of the controversy submitted to the arbitrators." (*Moshonov, supra*, 22 Cal.4th at pp. 775-776, quoting *Moncharsh, supra*, 3 Cal.4th at p. 28.)

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1 All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

Fink and Abraham assert the award should be vacated because the arbitrator (1) failed to decide several issues; (2) refused to adjudicate wage claims; and (3) incorrectly decided issues of law. We disagree, and address each contention in turn below.

A. The Undecided Issues

Fink and Abraham assert the arbitrator failed to rule on several issues. Specifically, they note the arbitration award is silent as to D & C's claims against them for fraud in the inducement, misappropriation of trade secrets, conversion, and intentional interference with contractual relations. Fink and Abraham point out D & C failed to present evidence on these claims in arbitration, and they believe the allegations were made simply to defeat the Labor Board's jurisdiction. They maintain the arbitration award should have found against D & C on these claims, but they fail to explain why the failure is prejudicial. Fink and Abraham also assert the arbitrator determined a net award was owed to Abraham, but it failed to specify exactly which parties were liable. They assert the award is incomplete because only the defunct entity D & C is named in the award and the judgment. The judgment does not name the individually sued defendants, Daehnke, Cruz, or F & A. They question whether the judgment will have any res judicata or collateral estoppel effect as to those parties or if they could be sued again. In short, Fink and Abraham assert, "despite the [a]rbitrator's seeming desire for expedience in the proceedings, he was not free to disregard 90 [percent] of the claims and address only those claims readily susceptible to reduction to a dollar sum." However, they cite to no authority or provide reasoned legal analysis to support this contention.

We conclude the claim lacks merit. Section 1283.4 provides that an arbitration award "shall include a determination of all the questions submitted to the arbitrators the decision of which is necessary in order to determine the controversy." Consequently, if "the record shows that an issue has been submitted to an arbitrator and that he totally failed to consider it, such failure may constitute 'other conduct of the

arbitrators contrary to the provisions of this title' justifying vacation of the award under section 1286.2, subdivision (e)." (*Rodrigues v. Keller* (1980) 113 Cal.App.3d 838, 841 (*Rodrigues*).)

However, as in the *Rodrigues* case, here the record does not demonstrate that any issue was submitted to the arbitrator that he totally failed to consider. "[I]t is presumed that all issues submitted for decision have been passed on and resolved, and the burden of proving otherwise is upon the party challenging the award. [Citations.]" (*Rodrigues, supra,* 113 Cal.App.3d at p. 842.) If the decision awards a sum of money to one party payable by the other, it has resolved "'all items embraced in the submission.'" (*Id.* at p. 843.) Furthermore, an arbitrator is not required to state reasons or find facts to support his or her award, and "[i]t is not appropriate for courts to review the sufficiency of the evidence before the arbitrator [citation] or to pass upon the validity of the arbitrator's reasoning [citations]." (*Ibid*.)

Here, the issues before the arbitrator was whether the Of Counsel attorneys were owed money, whether they breached their contracts and were not entitled to money, or if they owed D & C money. The arbitrator ultimately decided one attorney was owed money, and the other attorney was overpaid. The many claims in D & C's complaint were alternative theories of recovery all relating to the same factual scenario and did not require separate rulings. Moreover, we presume the arbitrator was aware any award against D & C, a general partnership, necessarily was rendered against the partners individually. Fink and Abraham cite no authority to support their theory the arbitration award's validity was somehow invalidated by D & C's decision not to also pursue tort damages. "Furthermore, a showing of substantial prejudice is required if the arbitration award is to be vacated pursuant to section 1286.2. [Citation.]" (*Rosenquist v. Haralambides* (1987) 192 Cal.App.3d 62, 69.) Fink and Abraham failed to meet this burden as they failed to show they were substantially prejudiced by any of the purported omissions.

B. Refusal to Adjudicate Wage Claims in Violation of Public Policy

Fink and Abraham assert, "A seminal question [was] whether [they] were employees entitled to protection under the Labor Code." They argue the arbitrator exceeded his jurisdiction by deciding the parties' written compromise agreement trumped the Labor Code and the public policy in favor of protecting employees from employers who fail to pay wages. They boldly claim, without supporting legal authority, "the [a]rbitrator *was obligated* to apply all the provisions of the Labor Code." (Italics added.) With this argument they attempt to invoke a rare "public policy" exception to the general rule prohibiting judicial review of arbitration awards. However, they misunderstand the scope of this limited exception.

As stated above, we must defer to an arbitrator's decision even when that decision is predicated on a mistake of law or fact or results in substantial injustice. (*Moncharsh, supra,* 3 Cal.4th at p. 33.) ""[A]n arbitral award should ordinarily stand immune from judicial scrutiny." (*Id.* at p. 32.) Fink and Abraham assert the award violates the public policy of California to assure employees are paid fair wages. While it is true there is a sound general public policy favoring the unconditional payment of fair wages, we are not at liberty to usurp the fact-finding authority of the arbitrator who resolved the factual issue of whether D & C failed to pay the Of Counsel attorneys the wages owed. The arbitrator made the factual determination "the sums [Fink and Abraham] claim were due on the date of termination were disputed and that dispute was resolved by exhibit No. 305." It resolved the factual dispute and ruled there was an overpayment to Fink, but some money was still owed to Abraham.

The public policy argument in this appeal is but a disguised assault on the correctness of the arbitrator's decision. Many decisions involve an aspect of public policy, but not all those cases are subject to judicial review. Only exceptional

circumstances will justify judicial intrusion: When the remedy ordered by an arbitrator conflicts with an explicit, well defined, and dominant policy "'"ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." [Citation.]' (*United Paperworkers Intern. Union v. Misco, Inc.* (1987) 484 U.S. 29, 43 . . . .)" (*Social Services Union v. Alameda County Training & Employment Bd.* (1989) 207 Cal.App.3d 1458, 1465.)

The handful of cases that have utilized the public policy exception demonstrate how narrowly the exception has been applied. For example, in *City of Palo Alto v. Service Employees Internat. Union* (1999) 77 Cal.App.4th 327 (*City of Palo Alto*), the court rejected plaintiff's argument the public policy requiring employers to provide a safe workplace for its employees justified judicial review of an arbitrator's decision to reinstate an employee who had threatened to shoot a coworker. It deemed this was an issue of fact the arbitrator had resolved against the City, and which the appellate court could not revisit. (*Id*. at pp. 338-339.) Nevertheless, the court vacated the award only because the reinstatement ordered by the arbitrator would compel the employer to violate an injunction. The court concluded the award reinstating the employee was "irreconcilable with the public policy requiring obedience to court orders . . . ." (*Id.* at pp. 339-340, fn. omitted.)

Thus, the exception applies only when the remedy ordered by the arbitrator conflicted with either a court order or an explicit statute or constitutional provision. In contrast, here the arbitrator simply determined there was a dispute as to fees owed under the Of Counsel employment contract, and it then decided no additional wages were owed to Fink, but money was owed to Abraham. This ruling is not at odds with a statute, court order, or constitutional provision as in *City of Palo Alto*. We cannot review the claim the arbitrator made a mistake of fact or law even when substantial injustice will ensue. (See *Moncharsh, supra*, 3 Cal.4th 1.)

C. Incorrect Decisions of Law Against Public Policy

Seeking another way to invoke the rarely applied public policy exception, Fink and Abraham argue the arbitrator enforced an illegal contract. Yet again, their public policy argument on appeal is but a disguised assault on the correctness of the arbitrator's decision. Fink and Abraham cite the California Supreme Court case *Reid v. Overland Machined Products* (1961) 55 Cal.2d 203, 207, which held, "An employer and employee may of course compromise a bona fide dispute over wages but such a compromise is binding only if it is made after the wages concededly due have been unconditionally paid." The *Reid* court explained the purpose of Labor Code section 206 is "to secure to the wage earner prompt payment of all wages concededly due and it expressly precludes an employer's coercing a settlement of disputed claims by offering conditional payment." (*Id.* at p. 208.) Fink and Abraham argue the exhibits show undisputed wages had not been paid prior to the parties' execution of the 2005 compromise documents. But the premise of the argument rests on the factual determination of whether or not the exhibits show *undisputed* wages had not been paid. It was D & C's contention the Of Counsel attorneys were paid additional fees in advance, weeks before they were due under the original Of Counsel agreements. The arbitrator expressly concluded the sums "due on the date of termination were *disputed*[.]" (Italics added.) Even if the arbitrator's fact finding and legal conclusions were incorrect, they cannot be disturbed. "[T]he residual risk to the parties of an arbitrator's erroneous decision represents an acceptable cost—obtaining the expedience and financial savings that the arbitration process provides—as compared to the judicial process." (*Moncharsh, supra,* 3 Cal.4th at p. 13.)

D. Other Incorrect Decisions of Law

Fink and Abraham begin the next section of their opening brief with the interesting statement: "Anticipating the argument that wages were not yet due at the time of the alleged compromise in May of 2005, D & C would face a greater hurdle that the

[a]rbitrator was not free to ignore." They explain the "greater hurdle" is their theory the compromise agreement did not specifically contain a release provision and was therefore an illegal compromise agreement. First we note, they apparently recognize the problem with their prior public policy argument. Namely, if the arbitrator made the *factual determination* payments were not due, then the parties did not violate the Labor Code or public policy by entering into a compromise agreement as to the disputed fees. Second, we conclude evaluation of the "greater hurdle" would require us to review the arbitrator's legal interpretation of the contract, which we cannot do.

The appellants also fault the arbitrator for failing to apply the Labor Code's interest (Lab. Code, § 218.6), waiting penalties (Lab. Code, § 203; Cal. Code Regs., tit. 8, § 13520), and attorney fees (Lab. Code, § 218.5) statutory provisions. Application of these provisions was briefed, argued, and decided by the arbitrator. Submitting legal questions to arbitrators "leaves open the possibility that they are empowered to apply it 'wrongly as well as rightly.' [Citations.] . . . Arbitrators do not ordinarily exceed their contractually created powers simply by reaching an erroneous conclusion on a contested issue of law or fact, and arbitral awards may not ordinarily be vacated because of such error, for "'[t]he arbitrator's resolution of these issues is what the parties bargained for in the arbitration agreement.'" [Citations.]" (*DIRECTV, supra*, 44 Cal.4th at pp. 1360-1361.) "Moreover, '[a]rbitrators, unless specifically required to act in conformity with rules of law, may base their decision upon broad principles of justice and equity, and in doing so may expressly or impliedly reject a claim that a party might successfully have asserted in a judicial action.' [Citations.]" (*Moncharsh, supra*, 3 Cal.4th at pp. 10 -11.) As such, the trial court correctly determined it could not review the arbitrator's legal decision interest, penalties, and attorney fees were not warranted in this case.

III

The judgment is affirmed. Respondent shall recover its costs on appeal.

O'LEARY, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.